

(2002) 09 DEL CK 0084
In the Delhi High Court
Case No : CWP 433 of 1995

Shri Thoru Ram

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 27-09-2002

Acts Referred:

Air Force Act, 1950 — Section 111
Border Security Force Act, 1968 — Section 40, 84
Border Security Force Rules, 1969 — Rule 123, 126, 40A, 43(3), 61
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 304A

Citation : (2003) 66 DRJ 172

Hon'ble Judges : S.B. Sinha, C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : R.P. Sharma, for the Appellant; Anjana Gosain and Digvijay Rai, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—The petitioner in this writ petition has, inter alias questioned a proceedings held in General Security Force Court. He also has prayed for a direction upon the respondents to pay unto him the full pay and allowances for the period he was deployed on duty during the period of his suspension.

2. Before advertng to the contentions raised in the writ petition, the fact of the matter in brief may be noticed.

3. The petitioner joined the Punjab Armed Police as Constable. He was enrolled in the Border Security Force in the year 1967 in the rank of Head Constable. At the relevant point of time, he was posted as Deputy Commandant. In May 1990, he was posted in 115 Bn. which was then deployed in South Bengal Frontier of the Border Security Force.

4. The petitioner allegedly asked certain candidates to undergo swimming exercises at Digberia, Distt. Barasat, West Bengal on 30th September 1991.

5. In course of the said exercise, three Constables died of drowning where after the petitioner was placed under suspension vide an order dated 19th December 1991 which is in the following terms:

"Whereas a case against Shri. Thoru Ram (IRLA No. 2776). Dy. Comdt. of 115 Bn BSF Border Security Force in respect of an offence for a grave act of criminal negligence, is under investigation.

2. And whereas it is alleged that the said Shri Thoru Ram, Dy. Comdt. of, 115 Battalion of the Border Security Force and committed certain acts of omission and commission by issuing illegal order on 30.9.91 to the members of the Force placed under his command to swim across a pond as a measure of punishment which has resulted in the unnatural death of Constables Manipal Singh, S.K. Chobey and Dalbir Singh on 30.9.91.

3. Now, Therefore, the Central Government in exercise of the powers conferred by Clause (i) of Rule 40-A of BSF Rules 1969 as amended hereby places the said Shri Thoru Ram, Dy. Comdt., under suspension with immediate effect. 4. It is further ordered that during the period this order remains in force the said Shri Thoru Ram Dy. Comdt. shall not leave the Headquarters of 115 Bn. BSF, without obtaining the permission of the competent authority."

6. However, on or about 14th January, 1992, he was taken back in service where for the following order was issued:

"As desired by Sector Headquarter Calcutta vide their Msg. No. A/4824 dated: 06 Jan" 92 & msg. No. A/4827 dated: 13 Jan 1992. The service of Sh. Thoru Ram, DC will be utilized for static and administrative duties. He will not perform any active duty."

7. However, the said order was modified by an order dated 17th January 1992 in terms whereof instead and in place of "for active duty" the words "for operational duties" were to be substituted. According to the petitioner, however, he had been deployed on full-fledged security duties which are considered to be tough and arduous ones.

8. A charge-sheet dated 10th July 1992 was issued against the petitioner in relation to the afore-mentioned incident dated 30th September, 1991, which is in the following terms:

"CHARGE SHEET

APPENDIX VI

Rule 53 (2)

IRLA No. 2776 Shri Thoru Ram, Dy. Commandant of 115 Bn. BSF, is charged with:-

BSF Act An omission prejudicial to good order Section 40 and discipline of the Forces.

In that he,

at Bn Rear HQ Digberia Camp, Badu, Barasat, on 30.9.91 at about 0645 hrs while working as Officer Commanding Rear HQ 115 Bn BSF: improperly omitted to take due care and caution while ordered troops to swim in nearby pond, in uniform with B-scale, consequence whereof 3 constables named No. 88123456 Const. Manipal Singh, No. 89002924 Const. Satayender Kumar Choubey and No. 90755665 Const. Dalbir Singh of the same battalion died due to drowning."

9. The said charge-sheet was issued in terms of the Section 40 of the BSF Act. On or about 23rd April 1992, a First Information Report was also lodged by the Commandant purported to be for commission of an offence u/s 304-A IPC for having caused the death of the afore-mentioned three constables. According to the petitioner, the second respondent herein as also the appellate authority of the petitioner visited Calcutta and held the conference of officers wherein he categorically stated that the petitioner would be severally punished. The General Security Force Court assembled on 15th July 1992, the order where for is to the following effect:

"Shri Thoru Ram IRLA No. 2776. Dy. Commandant of 115 Bn. BSF

Date 15th July 1992

The officers as mentioned below will assemble at BN. HQ. Tagorevilla, Alambazar, Calcutta (West Bengal) on the 22nd day of July 1992 for the purpose of trying by a General Security Force Court the accused person (named in the margin).

The senior officer to sit as Presiding Officer.

MEMBERS

1. Shri K.B. Singh (IRLA-05616) Addl. DIG, Trg. Dte, HQ. DG BSF New Delhi.
2. Shri M.A. Khan (IRLA 20666) 21C, Attached with Adm. Dte. HQ DG BSF New Delhi.
3. Shri A.M. Khan, (IRLA 28778) Dy. Comdt. 01 BN BSF.
4. Shri P.N. Das (IRLA 2986) JAD (MT) SHO BSF Krishnagar
5. Shri R.N. Nair (IRLA 33202) Dy. Comdt. 65 BN BSF.

WAITING MEMBERS

1. Shri L.D. Lohani (IRLA 32674) JAD (Comn) HQ SB Ftr BSF
2. Shri B. Sengupta (IRLA 35422) Dy. Comdt, 12 BN BSF

LAW OFFICER

Shri Kuldeep Saini, JAD (Law), HQ DG BSF New Delhi is appointed Law Officer

PROSECUTOR

Shri A.K. Bandyopadhyaya (IRLA 10317) AD (Prov) HQ SB Ftr BSF is appointed Prosecutor.

Services of Shri K.B. Singh (IRLA 05616) Addl. DIG, Trg. Dte HQ DG BSF New Delhi and Shri M.A. Khan (IRLA 20660) 21 C attached with Adm. Dte HQ DG BSF New Delhi, the members at Srl. Nos. 1 & 2 have been placed at the disposal of IG BSF South Bengal Ftr vide HQ DG BSF Signal No. R/3517 of 27th June 1992.

It is not practicable to appoint officers of different battalions/HQrs due to the exigencies of service.

The accused person will be warned and all witnesses duly required to attend.

The proceedings (of which only two copies are required) will be forwarded to the Chief Law Officer for post trial advice."

10. It is not in dispute that out of five members, S/Shri A.M. Khan, P.N. Das and R.N. Nair were from Bengal whereas S/Shri K.B. Singh and M.A. Khan were brought from Head Quarters. However, the waiting members were also from Bengal. The said S/Shri Singh and M.A. Khan had been placed at the disposal of the IG BSF South Bengal by respondent No. 2 in terms of Signal No. R/3517 of 27th June 1992. The local police recorded the petitioner's statement on 25th July 1992 which according to the petitioner caused grave prejudice to him. The said investigation, however, was closed on the next date. Within a short span of time namely on 30th July 1992, the BSF Court concluded its trial wherein the petitioner was sentenced to suffer forfeiture of seven years' service for purpose of pension and severe reprimand. He, thereafter filed a statutory petition on 27th November 1992. The petitioner, however, was permitted to superannuate on 3rd December, 1992. The order of suspension was revoked three months after his retirement namely on 5th March 1993. The petitioner's application against the order of conviction was rejected on 6th July 1994.

11. The petitioner in this writ petition raised a number of contentions including the constitution of the court. It was contended that the constitution of the court was in violation of Rule 61(1) of the Border Security Force Rules. It was further contended that the conviction of the petitioner is based on no evidence and thus the impugned order must be set aside being irrational. It was further submitted that the petitioner has been deprived of a fair trial in so far as the Law Officer not only addressed the court on questions of law but also on fact which is impermissible in terms of Rule 126 of the said Rules. The petitioner also contends that the material witnesses have not been examined.

12. Ms. Anjana Gosain, the learned counsel appearing on behalf of the respondents, on the other hand, would contend that main records as regards the constitution of the court is not available. As regards alleged violation of Rule 61 of the Rules, the learned counsel would submit that the same is directory in nature. According to the learned counsel, several witnesses were examined in the proceedings. The learned counsel would contend that the petitioner could

have objected to the constitution of the said court at the initial stage but he failed to do the same.

13. According to the learned counsel, in the said proceedings, nine witnesses examined themselves. The learned counsel would contend that those who had not been examined, their evidence was not material and thus, the petitioner cannot be said to be prejudiced thereby.

14. From what has been noticed hereinbefore, there cannot be any doubt whatsoever that although the petitioner was placed under suspension by an order dated 19th December 1991, as he had been put in service by an order dated 14th January 1992, he would be deemed to be on duty and thus from the said date, and, thus, he would be entitled to the entire pay and allowances admissible to him as if he was in active service. In this view of the matter, it is not necessary for us to go into the question as to whatever services an officer is to put, to, would be deemed to be in active service or not.

15. So far as the contention relating to illegal constitution of the court is concerned, it appears, that the DIG acts as a delegated authority. He, Therefore, normally is entitled to detail officers who are within his jurisdiction to take part in the said Court Martial. Rule 61(1) of the BSF Rules provides that a court shall consist, as far as practicable, of officers of different battalions or units. In the instant case, admittedly, the said provision has not been complied with. It is true that the said Rule having regard to the language employed therein cannot be said to be imperative in character but, as noticed hereinbefore, the respondents have failed to show as to why it was not practicable to comply with Rule 61 aforementioned. Furthermore, in terms of Rule 62(e) of the said Rules, it is for the convening authority alone to appoint members of the court. A bare perusal of the composition of court, as contained in the afore-mentioned proceedings dated 15th July 1992 would show that two of the members had been placed at the services of the DIG, Bengal by the Inspector General of Border Security Force Headquarters. Under what circumstances, the said officers were placed for the purpose of holding the trial is not known.

16. The contention of Ms. Gosain to the effect that the petitioner could have objected to the illegality in the matter of constitution of court at that time only does not seem to be correct in view of Section 84 of the BSF Act which reads thus:

"84. Challenge .-- (1) At all trials by a General Security Force Court or by a Petty Security Force Court, as soon as the court is assembled, the names of the presiding officer and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court.

(2) If the accused objects to such officer, his objection and also the reply thereto of the officer objected to shall be heard and recorded, and the remaining officers of the court shall in the absence of the challenged officer decide on the objection.

(3) If the objection is allowed by one-half or more of the votes of the officers entitled to vote, the objection shall be allowed, and the member objected to shall retire, and his vacancy may be filled in the prescribed manner, by another officer subject to the same right of the accused to object.

(4) When no challenge is made, or when a challenge has been made and disallowed, or the place of every officer successfully challenged has been filled by another officer to whom no objection is made or allowed, the court shall proceed with the trial."

17. Section 84 of the Act, thereupon, operates in a limited field. In terms of the said provision, the petitioner could not have objected to the legality or otherwise of the constitution of the court.

18. The said provision is *pari materia* with the provisions of Section 111 of the Air Force Act. B.N. Kirpal, J. as his Lordship then was, in *Sahab Dayal Sharma v. Union of India and Ors.*, 1987 L. IC 843 held:

"13. ...By virtue of Section 111, it was respondent 3 who alone could be the Convening Officer. In fact in the present case the decision to order District Court Martial was taken by respondent 3 on 30th Sept. 1973. Rule 43(3) thereafter required that very convening officer is to appoint and detail officers to form the court. This was not done in the present case. The function under Rule 43(3) was discharged not by respondent 3 but by Wing Commander R.O. Lakin. This was not permissible under the said rule. ..."

19. It is, Therefore, incorrect to contend that the petitioner could have raised the objection at that stage.

20. As regards judicial review, the learned Judge held:

16. ...In any case, what is being challenged by the petitioner here is jurisdictional fact, namely, the jurisdiction of the court martial as constituted to try the petitioner. If the court martial has not been validly convened, then it had no jurisdiction to proceed with trial and consequently its decision and the subsequent action taken thereon has all to be regarded as being without jurisdiction. This jurisdictional infirmity can always be challenged by filing a writ petition under Article 226 of the Constitution. The reading of the aforesaid provisions of the Act and the Rules leaves no manner of doubt that the District Court Martial was not properly constituted as the mandatory provisions of Rule 43(3) had not been complied with and because of the invalidity in the order convening that court, the decision of the said court and the punishment which has been ultimately imposed on the petitioner by respondent 3, and upheld by the Central Government, has Therefore, to be quashed."

21. In view of the afore-mentioned authoritative pronouncement, the constitution of the court must be held to be bad in law.

22. It is now a well-settled principle of law that a statutory authority must act

within the four corners of the statute. In *vitarelli v. Seaton*, (1959) 359 US 535: 3 L Ed 1012 Justice Frankfurter laid down the law in the following words:.....

"He who takes the procedural sword must perish with it" as quoted in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, as under:

An executive agency must be rigorously held to the standards by which it professes its action to be judged.... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

23. It is not in dispute that Shri K.B. Singh and Shri M.A. Khan were posted in the headquarters of the Director General of Delhi. The petitioner had raised a contention that there had been no dearth of officers from South Bengal Frontier. According to him, hundreds of such officers are available in the State but although the authority could find out two waiting members from West Bengal, in the court, two members from outside had been thrust upon the convening authority. Such an unauthorized act on the part of the convening authority, in our opinion, would amount to malice in law. The petitioner, as noticed hereinbefore, has categorically stated that the respondent No. 2 together with the appellate authority came to the site and threatened that the petitioner would be dealt with severally. The allegation of malice which led to the unfair trial of the petitioner must be considered from this angle. The submission of Ms. Gosain to the effect that as majority of members were from West Bengal, no prejudice was caused to the petitioner is stated to be rejected. It is now a well-settled principle of law that for the purpose of proving bias, the actual bias is not necessary to be established. What is necessary to be established in a case of this nature is a real likelihood of bias. When a person becomes a member of an adjudicating body, although his discharge may not be conclusive but it is well-known that he may be able to persuade others to agree with him (See *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*,

24. It is now a well-settled principle of law that justice is not only to be done but manifestly seen to be done.

25. In "Natural Justice" by Paul Jackson, the law is stated to be in the following terms:

"It is the recognition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached had a fair hearing been given by an impartial tribunal. The maxim is applicable precisely when the court is concerned not with a case of actual injustice but with the appearance of injustice, or possible injustice. In *Altco Ltd. v. Sutherland*, (1971) 2 LR 515 Donaldson J. said that the court, in

deciding whether to interfere where an arbitrator had not given a party a full hearing, was not concerned with whether a further hearing would produce a different or the same result. It was important that the parties should not only be given justice, but, as reasonable men, know that they had had justice or "to use the time hallowed phrase" that justice should not only be done but be seen to be done. In *R. v. Thames Magistrates' Court, ex p. Polemis*, (1974) 1 W.L.R. 1371, the applicant obtained an order of certiorari to quash his conviction by a stipendiary magistrate on the ground that he had not had sufficient time to prepare his defense. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had no defense to the charge.

"It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: "Well, even if the case had been properly conducted, the result would have been the same." That is mixing up doing justice with seeing that justice is done" (per Lord Widgery C.J. at p. 1375): *Stringer v. Minister of Housing*, [1970] 1 W.L.R. 1281.

In *Maxwell v. Department of Trade* [1974] 1 Q.B. 523 Lawton L.J. expressed a similar idea when he said, "Doing what is right may still result in unfairness if it is done in the wrong way." *Barrs v. British Wool Marketing Board*. [1957] S.C. 72, per Lord President (Clyde). It is because the assurance that justice has been seen to be done is, in itself, an important element in the public confidence in the settlement of disputes, whether in the courts or by other bodies, that, for example, the rules of natural justice may apply even to what might be regarded as "open and shut cases." Megarry J. explained why, when warning of the danger of regarding any case as "open and shut";

"When something is obvious" (it may be said), "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; or inexplicable conduct which was fully explained or fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events" (*John v. Rees* [1970] Ch. 345."

26. We, Therefore, agree with the learned counsel that by reason of such constitution, the petitioner has been prejudiced. In any event, the said officers were appointed by the second respondent and not by the convening authority which is imperative as would be evident from Rule 62(e) which reads as under:

"Rule 62. Duties of convening officer when convening Courts: When an Officer convenes a Court he shall:

- (a) issue a convening order in the appropriate form set out in Appendix VII;
- (b) direct upon what charges the accused is to be tried and ensure that the accused has been remanded for trial by a Court upon these charges; by his Commandant;
- (c) if he is of the opinion that charges shall be put in separate charge sheets, so direct and shall also direct the order in which they are to be tried;
- (d) direct, if there is more than one accused whether the accused are to be tried jointly or separately;
- (e) appoint members of the Court and any waiting members;
- (f) in convening:
 - (i) a General Security Force Court; or
 - (ii) a Petty Security Force Court which he considers should be attended by a Law Officer, take the necessary steps to procure the appointment of a Law Officer by or on behalf of the Chief Law Officer;
- (g) appoint an officer, subject to the Act or a counsel assisted by such an officer subject to the Act, to prosecute:

Provided that the convening officer may appoint more than one such officer to prosecute if he thinks fit (R. 123)
- (h) appoint an interpreter wherever necessary;
- (i) send to the senior member the charge sheet, the convening order and a copy of the record or abstract of evidence from which any evidence which in his opinion would be inadmissible at the trial has been expurgated;
- (j) forward to each member of the court and to each waiting member, a copy of the charge-sheet;
- (k) forward to the prosecutor copies of the charge sheet and convening order and the original record or abstract of evidence together with an unexpurgated copy thereof showing the passage (if any) which have been expurgated in the copy sent to the senior member;
- (l) forward to the Law Officer (if any) copies of the charge sheet and convening order and an unexpurgated copy of the record or abstract of evidence showing the passage (if any) which have been expurgated in the copy sent to the senior member;
- (m) ensure that the Commandant has summoned all the prosecution witnesses and such defense witnesses as the accused may have requested to be

summoned under Rule 64."

27. It is true that nine witnesses had been examined in the court of enquiry. According to the witnesses, the petitioner gave direction to the Constables to jump into water with the "B" scale equipment but it has also come in evidence that the petitioner categorically stated that only those persons who know swimming should do so and others who do not know swimming would be given the lessons. If further appears from the records that whereas others swam to the other side of the pond, only one person was drowning. With a view to save him, two other persons went near him and in the process, all the three persons died. It further appears from the records that the petitioner merely directed as regards carrying out of practice by swimming by saying "shuru karo" meaning thereby "start". PW1 HC Jeevan Bhujal categorically stated that the petitioner instructed that only those persons who know swimming should come forward and is to the same extent is the evidence of Sub Inspector Reddy who examined himself as PW4. Sub Inspector Reddy was in charge of the Constables in question. Constable Satpal and Constable Vijay Kumar who examined themselves as PW5 and 6 respectively also confirmed to the afore-mentioned statement of the witnesses. It further appears from the evidence of PW1 that under the instructions of the petitioner even nylon rope and other swimming aid were brought to the place of exercise, which shows that all due care and caution had been taken. It is, Therefore, not a case where the petitioners forced those to undertake the said exercise who did not know swimming. It has also not been disputed that under the instructions of the petitioner, only a few men entered the water and others had awaited.

28. In this view of the matter, we are of the opinion that it was not a case where it could be said that charges had been proved against the petitioner.

29. Rule 126 of the BSF Rules reads thus:

"Rule 126. Power and duties of Law Officer: Where a Law Officer has been named to act on the court, he shall-

- (a) give his opinion on any question of law relating to the charge or trial whenever so required by the Court, the prosecutor or the accused;
- (b) inform the Court of any irregularities or other infirmity in the proceedings;
- (c) inform the Convening Officer and the Court of any infirmity or defect in the charge or in the constitution of the Court;
- (d) sum up the evidence and give his opinion on any question of law before the Court proceeds to deliberate upon its findings.

(2) It shall be the duty of the law Officer to ensure that the accused does not suffer any disadvantage in consequence of his position as such or because of ignorance or incapacity to examine or cross-examine witnesses and for this purpose the law Officer may, with the permission of the Court, call witnesses and

put questions to them which appear to him to be necessary or desirable.

(3) In the discharge of his duties, the Law Officer shall maintain an attitude of strict impartiality.

(4) Where any opinion has been given by the Law Officer to the Court on any matter before it, it may be entered in the proceedings, if the Law Officer or the Court desires it to be entered.

(5) The Law Officer shall represent the Chief Law Officer at a Security Force Court."

30. The proceedings in the Security Force Act are akin to the jury trial although actually it is not, as has been noticed by the Apex Court in Union of India and Another Vs. Charanjit S. Gill and Others,

31. The role of a Law Officer in terms of the afore-mentioned Rule, need not be highlighted. The Law Officer in proceedings under the Act, acts like a Judge-Advocate under the Army Act. In his briefing, he categorically stated that the statement of HC Jeevan Bhujal had been corroborated in material particulars of PW3, 4, 5, 6, 7, 8, 9, 10 and 12. Whether a statement had been corroborated or not is a question of fact. The Law Officer, Therefore, could not express his opinion thereupon.

32. Yet again, while referring to PW 11, he stated that this statement had also been corroborated by the enrolled follower (barber) Ram Narayan.

33. Yet again, in answer to court question No. 20, the accused had also accepted that those three Constables were putting on "B" scale equipment.

34. Thus, the Law Officer not only expressed his opinion on question of fact, he sought to influence the court by saying that the petitioner has accepted the act which would amount to a confession of guilt by him.

35. In view of the afore-mentioned infirmities, we are of the opinion that the impugned proceedings cannot be sustained which are set aside accordingly.

36. This writ petition is allowed with the direction that the arrears must be paid to the petitioner at an early date and not later than one month from the communication of this order with interest at the rate of 9% per annum till actual payment. The respondents shall also bear the cost of the petitioner which is quantified at Rs. 5000/-.